

INTRODUCTION OF JUSTICE ANTONIN SCALIA

September 9, 2001 - Hofstra Law School

I thank Dean Rabinowitz (Yelsin) for the opportunity to meet and then introduce Justice Antonin Scalia to you tonight. In some ways, Justice Scalia is such a well-known figure in legal circles that he “needs no introduction. I would, however, like to use this opportunity to tell you some of the less well-known facts about his background, and then indicate why I think we should all be particularly interested in hearing his views on professional ethics.

Justice Scalia was born in New Jersey, the only son of a Sicilian immigrant and a first-generation Italian American, both of whom were teachers. He graduated first in his class, both in high school and at Georgetown University, and then went on to Harvard Law School, where he graduated *magna cum laude*. Justice Scalia’s early professional years were then spent between private and public practice and academia. Most notably, he worked as an attorney for a private law firm in Cleveland, he taught law at the University of Virginia Law School, and University of Chicago Law School and he served two positions in the Nixon Administration – including at the Office of Legal Counsel, where he gave legal advice to the President and the Attorney General. In 1982, President Reagan named him to the D.C. Court of Appeals, and in 1986, to the country’s highest court.

Since his appointment, Justice Scalia has made a name for himself as one of the most provocative figures on the Court. His reputation is partly a product of his lively personality: He has been consistently quick-witted and outspoken with his views, and sometimes even combative in his opinions and at oral argument. In part, however, Justice Scalia’s reputation stems from the way he has approached a number of ethical issues in his legal decisions. In particular, he has used some of his most searing words when deciding constitutional questions that touch on those ethical issues that currently vex us most as a country: topics such as euthanasia, abortion, gay rights, and the proper place of religion in public life.

These are things that have made people talk about the Justice. Legal ethics, by contrast, is a field that people rarely associate with the bulk of his work. Over the years, I

have nevertheless come to understand that much of his thinking touches on this field, broadly construed. Because my reasons for saying this may not be obvious, and because legal ethics is the topic of this conference, I would like to spend a little bit of time explaining the relation that I see.

The phrase “legal ethics” brings together two very different terms—law and ethics—and when I think of the phrase, I am reminded of a story that Robert Bork relates in his book *The Tempting of America*. According to the legend, Justice Holmes and Judge Learned Hand, two of the most important legal minds of this century, once had lunch together. Just afterwards, as Holmes began to drive off in his carriage, Hand suddenly ran after him crying “Do justice, Sir, do justice!” Hearing this plea, Holmes stopped his carriage and retorted: “That is not my job, my job is to apply the law.

What this exchange raises is the degree to which the law is separable from morality,¹ and the degree to which moral insight can either help or hinder one’s understandings and applications of the law. Though Justice Holmes and Judge Hand were talking about the kinds of formal legal norms that are passed by Congress or found in the Constitution, the same kind of question can be asked about the less formal norms that guide our professional practice and make up the subject of legal ethics. The question would then involve asking whether legal ethics is completely separable from personal ethics more generally. And if the caliber of mind involved in the exchange between Justice Holmes and Judge Hand is any indication, this question is likely to be a very difficult one, one over which reasonable and highly intelligent persons can disagree.

I would never attempt to resolve such a debate here. I would, however, like to say some things that will help clarify the relation, so as to set the stage for Justice Scalia’s talk and for some of the kinds of questions that we will need to think about at this

¹ Technically, this exchange talks about “justice,” not morality. Justice is, however, often thought of as a particular kind of moral concept. Justice is sometimes thought of as “political morality”; HLA Hart calls it the “most legal of our moral concepts”; sometimes justice is thought of as the particular moral concept that applies to political institutions, because it is the one that raises issues of group fairness (rather than private first-person morality). Hence, my reason for thinking of the concept of “justice” as a particular kind of moral concept.

conference and that we should grapple with and think about throughout our professional legal careers.

In one sense, legal ethics *is* different from ethics. Ethics is concerned with the norms of conduct that should govern people *just insofar as they are people*, whereas legal ethics—much like the ethics of many other professional fields—is concerned with the norms that should govern people insofar as they inhabit certain particularized roles, such as those of the lawyer or the judge. An understanding of these rules, and of the ways in which they might be improved, will thus require developing a secondary understanding of how these roles differ, and how they fit together into a larger social practice.

One must also try to understand how these practices might themselves be justified—a question that goes beyond acceptance of the norms. Thus—to use an example that might help clarify these issues—you might come to believe that it is perfectly appropriate for a lawyer working in an adversarial system to zealously advocate for his or her client’s rights, if you believe that an adversarial system can produce something of value or truth. Still, it might be inappropriate for a judge in such a system to take one person’s side in a controversy, before the case has been heard. Different roles require different norms—as this example shows.

There is, finally, a third dimension to legal ethics, which touches on ethics in a more straightforward sense but still comprises a distinct subject. Legal ethics should provide a person with professional guidance as to how to resolve conflicts when professional norms tell one to conduct oneself in a manner that is somehow at odds with your personal moral views. This might happen if, for example, you are asked to help provide access to justice to an indigent client whose actions you find morally repugnant.

I have now said enough to begin indicating why I view much of Justice Scalia’s work as bearing on the topic of legal ethics. Justice Scalia has helped provoke a number of illuminating debates concerning the professional norms that should govern not practicing lawyers—the ordinary topic of legal ethics—but federal judges. I understand Justice Scalia’s jurisprudence to begin with a proposition that we should all agree to—namely, that judges should try to interpret the law correctly, and without personal or political bias. He has, however, become one of the most important and outspoken proponents of the idea that following this norm requires the adoption of a particular

interpretive methodology, namely that of formalism and plain meaning. Due to the force with which he has presented these ideas, these are terms that have become almost synonymous with his jurisprudence. Justice Scalia has also been uncommonly articulate about how he views this norm as related to the role that federal judges should play in the larger social practice of democratic government. He has argued, in effect, that because federal judges work in a democratic system, they should refrain from reading the Constitution in a way that will remove questions from majoritarian resolution—*unless the Constitution is perfectly clear on the matter*. All of this thinking can be viewed as a kind of colloquy on how federal judges should resolve conflicts between their professional norms and the ordinary norms of ethics. Moreover, although Justice Scalia's views on all of these matters have important antecedents, there is no doubt that he has clarified them, and has helped develop them, in a number of very innovative and illuminating ways.

I do not mean to suggest—and the Justice will be the first to agree with me on this one—that any of these thoughts are uncontroversial. To the contrary: Justice Scalia appears to delight in controversy, and his views have provoked a growing body of responses from not only legal but also academic and popular circles. Many—including some very prominent thinkers such as Ronald Dworkin – have questioned whether Justice Scalia's theories of interpretation are the right ones, and have articulated alternatives. Others have wondered whether general theories of interpretation are even helpful when trying to get the law right. Still others have challenged Justice Scalia's ways of understanding the role of a Constitution in our democracy, and the role that judges should play in preserving our nation's values. Finally, a number of critics have argued that Justice Scalia's particular views of how judges should interpret the law might themselves be a reflection of how well these norms further some of his own personal moral views.

As the common saying goes—it is better to be looked over than overlooked—and responses like these are a tribute to just how important and powerful Justice Scalia's presence has been in our current legal culture. Controversies like these are also healthy: They help raise our awareness of how difficult it can be to identify and navigate the conflicts that we will all inevitably feel at times—as lawyers, as judges, or as justices—in integrating our personal sense of morality with the norms of our profession.

I do not know what Justice Scalia will decide to talk about today. The fact that he has provoked so much discussion relating to professional judicial norms makes me *very* excited to hear what he has to say on any topic he chooses to discuss. I have no doubt that he will say something very insightful, and will provoke us all to reflect more deeply about his chosen topic and about our own views.

In closing, the title of this conference is “Legal Ethics: What Needs Fixing?” The title suggests that we are here, as peers, to discuss the future of our professional norms. In this context, there is at least one norm that applies to all of us, regardless of the role that we end up playing in the law: It is the requirement to listen with an open mind, to think critically about what we hear, and to try to develop a reflective understanding of the issues, which we can then offer back up for discussion. I hope that the law students in this audience will appreciate that taking on this norm will be a vital part of their development as lawyers, and that the lawyers and academics who have come here tonight will appreciate how important their participation in the exchange of ideas is for the development of our profession. With these thoughts in mind, and without any further hesitation, I hope that you will join me in welcoming Justice Scalia to Hofstra Law School, and in listening to what the Justice has to say at this year’s Legal Ethics Conference.